No. 73 & 74.

Brf. of Stmt. & Dec. for Appellants

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THE YOUNG WOMEN'S CHRISTIAN HOME, APPELLANT,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENIE RHODES, DECEASED.

No. 74.

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vs.

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APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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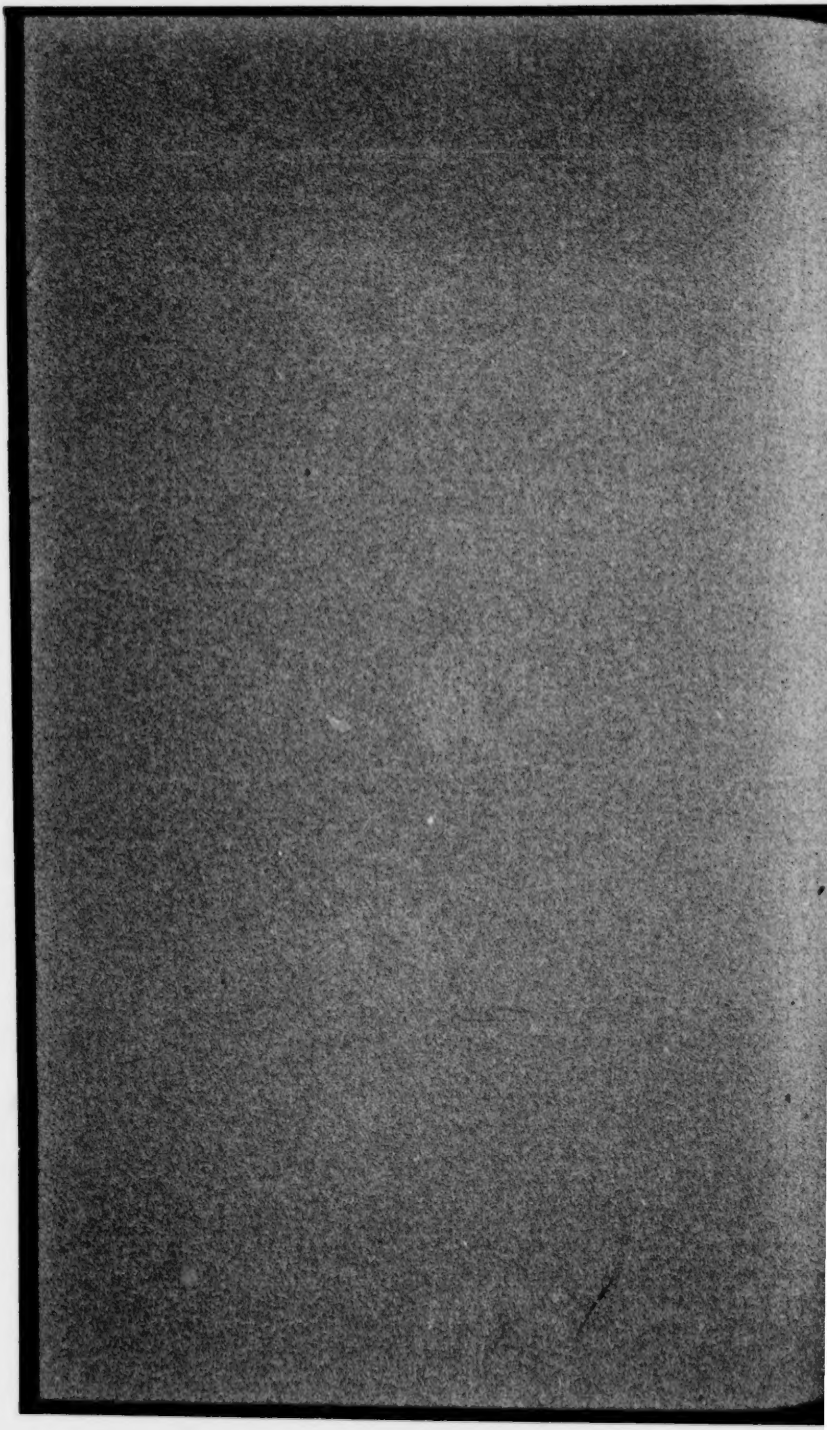

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Appellee's Statement of the Case.

This is the first time, it is believed, that the interesting question has come before the highest court of the United States of how the common law determines the succession to

personal property the owner of which and the person whom his will or the law appoints to succeed to that property in the event of his death lose their lives in the same disaster, or, more broadly speaking, in unprovable time-relation—the same question that arose in the General Stanwix case of the text books, sometimes called "Lord Mansfield's Undecided Case" (King *vs.* Hay, 1 W. Bl., 640), and later in the thoroughly considered case of Underwood *vs.* Wing, or Wing *vs.* Angrave as the case was entitled in the House of Lords (19 Beav., 459; 4 De G. M. & G., 633; 8 H. L., 183).

These cases grow out of a bill of interpleader filed in the supreme court of the District of Columbia by the administrators *cum testamento annexo* of the estate of Sophia Rhodes, deceased, *versus* three claimants or sets of claimants to the residue of her estate, viz:

(1.) The appellee, French, who is administrator of the estate of her son, Eugene Rhodes;

(2.) The appellants, Faul and Wasner, her sister and brother, who are her next of kin if her said son did not survive her; and

(3.) The other appellant, The Young Women's Christian Home, a corporation, which was substituted by her will in lieu of her son as sole legatee in the event of her becoming the survivor of both her husband and her son.

The agreed statement of facts in the record (15) includes substantially all that can be said under that head. It shows, with various attending circumstances, that the testatrix and her said son lost their lives as a result of the foundering of the steamer "Elbe" in the North sea in 1895.

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The testatrix was 52 years old, corpulent and short-winded; her son was 23 years old and a rather good swimmer. Except such disparity of age, sex, size, health, and swimming capacity, there is no evidence to show the order of the two deaths. The husband of the testatrix had died in this city three days before.

The court of first instance decided in favor of the Home, ruling against Faul and Wasner on the ground that the will gave the property to the Home in the only event whereon they could be entitled, that of *codemise* (a word coined for brevity's sake), and ruling against the son's legal representative on the ground that *codemise*, though neither proved nor presumed, was, on the score of authority, to be acted on as what actually took place (26).

The Court of Appeals was unable to see any difference between presuming *codemise* and acting on *codemise*, in the absence of evidence, as what took place. The correct position it held to be this: that as the son was preferred as beneficiary and was alive and well as late as there was any evidence of the two, the fatal burden of displacing him as of the time of his mother's death lay on those, the appellants, who could be entitled only in the event of such displacement (33).

In whatever way the matter may be reasoned out, whether (*a*) by choosing among the three contingencies possible—that the mother, the son, or neither, survived the other—or (*b*) by passing those contingencies by as unascertainable and seeking ground beyond for *prima facie* right, the result, we submit, must be the affirmance of the decision appealed from for, if the former course be followed, the son's survivorship

must be found as a fact, and, if the latter be followed, every other ground for *prima facie* right must be deemed secondary and subordinate to that of the unextinguished and unextinguishable preference made by the will and the law in the son's favor.

Argument.

Scope of the question.

The trouble peculiar to these cases arises whenever death comes, in an order of time not provable by *direct* evidence, to a property-owner and to the person appointed by law, will, or settlement to succeed to that property upon such owner's death. The subject is usually, but misleadingly, spoken of as "deaths in the *same disaster*"—"commorientes" the civilians called the decedents—as if nearness together in time and place of the two deaths was an essential feature of the trouble. A moment's thought will suffice to show that this is too narrow a view to take of the subject, and, as was said in the case of Underwood *vs.* Wing (8 H. L., 208, 217), serves only to confuse the judgment. It is not nearness together, but *uncertainty as to the order of occurrence*, of the two deaths, which first or both at once, that begets the trouble; and hence the trouble is met with as well where the deaths happen far apart in space as near together; as well where the time of one of them is known, that of the other being unknown, as where the time of each is an unknown quantity. It is for this reason that, as the precedents show, the subject merges into the ordinary death presumption from seven years of unexplained absence (Rhodes *vs.* Rhodes, 36 L. R. Ch. Div., 586; Montgomery *vs.* Bevans, 1 Saw., 660; Eagle's case, 3 Abb. Pr., 218; Whiteside's appeal, 23 Penn. St., 114; Clarke *vs.* Campbell, 15 N. J. (Eq.), 119).

Nor is it deaths alone, but other events as well, that, happening in doubtfully ascertainable relation to each other, may give rise to the trouble. A ship at sea is lost in doubtfully ascertainable time-relation to a sale or insurance effected of it on land; an animal dies, or does some act devolving liability on its then owner, about the time of a change in its ownership; an agent converts his principal's realty into personalty, or *vice versa*, just *before*, *at*, or *after* (impossible to prove which) the principal's death; a right of indemnity may turn on the imperfectly provable time-relation between a wrongful act and a change of citizenship, or upon the place-relation between that act and a State line; an inheritance may depend on the unprovable time-relation between a death and a change in the law of descent; a jurisdiction may turn on the doubtfully ascertainable locus of a contract or a crime.

These instances may be extended indefinitely. Yet in none of them has a presumption ever been contended for that the two events were coterminous, except where the *two events were human deaths and those deaths in the same disaster* (and, of course, where crime was charged). *Therein lies the peculiarity of this case.* If there is no such presumption in the law, then the order of occurrence of the two deaths, *if material*, remains to be determined just as all other issues of fact are judicially determined.

In issues of fact, in default of evidence enough to support a finding as to what the fact was, judgment goes against the side or sides on which the onus rests at the start.

1. Is there such default in this case?

2. If so, on which two of the three sides to the suit rests the fatal onus?

Sufficiency of the Evidence.

The authorities to the insufficiency of the evidence in cases of this nature go only to its insufficiency *to shift the onus* from the side resting thereunder at the start, and even those authorities had their beginning before it was as well known as it now is how very reliable disparity of age, sex, and swimming capacity is as proof of survivorship between the victims of shipwreck.[1]

Where evidence the only arbiter.

Where, at the start, presumption stands absolutely neutral, neither side having the onus or *prima facie* right, as where the decedents were joint tenants or cross-remaindermen, &c., &c., it would seem that the evidence, no matter how weak, must suffice, for no means has the law for solving questions of fact except evidence and presumption, either of which failing the other must suffice. Suppose "A" should devise his property to X, to Y, or to Z (not relations of his), in the alternative, according as he might die *before*, *after*, or at the *same time* as "B," and "A" having died in unprovable time-relation to "B's" death, his executors should bring interpleader against X, Y, and Z, substantially as has been done in this case. One of the defendants would in any event be

[1] Of the 60 women and 70 children on the "Elbe," one only survived, a woman.

Of the 176 women on the "Bourgogne," 175 were lost. Every child was lost.

Of the 976 people on the "Atlantic," 429 of whom were saved, not a woman or child was saved.

entitled, and no reason would exist for putting the onus on any two that would not equally force it on the third, thereby leaving evidence the only means to decide by.

The testimony of Vevera, the witness introduced to prove codemise, bears ample evidence on its face of its unreliability. He said (17) that on the evening preceding the disaster his attention was attracted to the testatrix and her son, "*as they seemed so happy.*" Seemed so happy! When only a few hours before they had received a cablegram of the death of a husband and father whom they had loved enough to start for his bedside across the ocean directly upon "being advised of his extreme illness." Again the witness said that on coming on deck he first went to a boat, filled with ladies, on the *right-hand* side of the vessel; that that boat after leaving the vessel a short distance was swamped, and that he then crossed to a boat on the other side, being the *last person* and the *nineteenth man* to get into that boat. It is agreed (16) that *twenty-one* persons were in that boat; and one of them was a lady who had escaped from the capsized boat and who could not possibly have passed around the vessel under the circumstances. Other reasons for doubting this witness appear on his statement, but the foregoing is enough to show that either he was too much excited at the time to know what he saw or else was not trying to tell the truth when he testified.

The testatrix's son, by reason of his better size, stronger sex, and the nature of his clothing, was probably more able than his mother to withstand the death cause. Then, too, his knowing how to swim would naturally tend to ward off despair and collapse and to give him self-possession to look out for wreckage or other means of prolonging life, keeping

himself afloat in the meantime. His younger and warmer blood must also have stood him in good stead in the icy water of that North sea.

"Where shipwreck occurs, men are more apt to be saved "than women. * * *

"Persons with apoplectic tendencies are more apt to be "struck with the disease when suddenly precipitated into "the water" (Wharton and Stillé Med. Jur., § 726).

But so manifestly more credible is it, from the known facts, that the son survived than that the mother did, or than that both died at the same exact instant of time, that if choice of one of these three propositions is to be made in the light of the evidence, unaffected by onus or *prima facie* right, it is not deemed necessary to present any further argument on the part of the son. Unless his representative has some adverse presumption to overcome, he must prevail.

Where Rested the Fatal Onus at the Start?

As between the Home, as legatee, and testatrix's next of kin—if not her son, then her brother and sister.

Logic knows but one means for the ascertainment of facts—*evidence*. Law has added one other, *presumption*, in part to meet the necessity for decision where evidence may wholly fail or be in equipoise.

Meaning of "presumption" in such cases.

The only office of presumption, in the sense the word bears here, is to allot *onus probandi* and its counterpart, *prima facie* right, between the opposing sides at the start. For instance, to presume in favor of either of the three possible happenings

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in these cases, or of either of the three parties to the suit, will have for effect simply to put the onus on the other two—a fatal onus if the evidence fail to shift it. With conclusive presumptions, or with the shifting of the onus by the evidence as it unravels, this discussion has no concern. Its sole concern is with the placement of the onus at the start, before the evidence is gone into. Who has the onus to bear of proving a fact is a question the decision of which necessarily precedes the making of that proof, and therefore cannot be determined by it. If the onus be put on each contingency alike, or on neither, it is neutralized, and, in that condition of the case, if it be material to elect among them or *to eliminate any one of them* the evidence, no matter how weak, must be held to suffice for that purpose, for no other means will exist.

There is no authority or contention for a presumption that either decedent survived the other.

Neither contingency has *prima facie* right or the onus.

That both died at the same time implies that not any, not even the smallest, particle of infinitely-divisible time intervened between the two deaths to put one of them ahead of the other, but that all of the many things that might have taken place tending to hasten one and retard the other of the two deaths just so focused and counterbalanced their influences as to cast the two deaths on the same exact instant of time. That such an almost miraculous coincidence was what actually befell nobody can believe, and to dispose of the property on that theory will be to do so in the face of almost certainty that such disposal would be found to be wrong if the actual fact should become known.

The wonder is that a contingency so against "manifest probability" (Best's Ev., Book III, pt. I, p. 369), so devoid of every feature of a legitimate presumption of fact, was ever held to be presumptive; but the reports show that it was so held by many, probably by a majority, of the cases that antedated Underwood *vs.* Wing.

Underwood *vs.* Wing and what was decided by it. (8 H. L., 183.)

Underwood *vs.* Wing was a case where, in so far as material to this inquiry, husband and wife, by mutual wills, bequeathed property each to the other, and if such other "die in my lifetime," then over to a man named Wing, who was not related to either of them. In other words, Wing was given the property in the event of *either* survivorship, but not, in terms at least, in the event of codemise.

Both lives were lost by shipwreck, without evidence to show in what order, and contest for the property arose between Wing, on the one part, relying on disparity of age, sex, and health to show the husband's survivorship, and Mr. Underwood's next of kin, on the other part, relying on the decisions that, down to that time, held codemise to be presumptive.

The precise points ruled by the case it is important to know, for to misunderstanding in that regard is easily traceable the confusion that prevails in some later cases. Those points were:

1. That in such cases the common law requires evidence from start to finish, judgment going in the end, if there be not evidence enough to shift the burden of proof, against the party resting under that burden at the start.

2. That neither codemise nor a survivorship is presumed by law, nor is the evidence such cases admit of sufficient to shift the burden of proof.[1]

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[1] The two law judges who had been called into the case, referring to the statement imputed to the master of the rolls on the trial below that "the conclusion of the law is that both died at the same moment," said:

"According to our view, this is not correct. We think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both actually did die at the same moment of time."

And the Lord Chancellor added:

"It cannot be assumed to be proved, or probable, or possible, that two human beings should cease to breathe at the same moment of time, for that is hardly within the range of imagination, and to adjudicate on such a principle would, I think, be proceeding on false data."

In the House of Lords Lord Campbell said:

"I need hardly say that I think there is no foundation for the doctrine * * * that when it is left doubtful which of two individuals died first, there is a presumption of law (*juris et de jure*) that they die at the same point of time. I will not say that this is impossible, although time like matter is said to be infinitely divisible, but such a presumption is not warranted by decision, by dictum, or by analogy."

In Newell *vs.* Nichols it was said:

"There is no legal presumption which courts are authorized to act upon that there was a survivor any more than

3. That as between a testator's next of kin and his legatee the burden rests on the legatee of proving the contingency or contingencies that underlie his bequest, the next of kin having *prima facie* right at the start; or, as applied to the cases at bar, the burden lies on the Home of proving co-demise or the mother's survival (*i. e.*, the son's non-survival),

Whoever was next of kin has *prima facie* right.

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that there was a particular survivor. It is not claimed that there is any legal presumption that the children died at the same time. Indeed it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and as a physical fact it may perhaps be inferred that they did not."

And in Cowman *vs.* Rogers (73 Md., 403):

"By that (the common) law where several lives are lost in the same disaster there is no presumption of survivorship by reason of age or sex; nor is it presumed that all died at the same moment.

"It is not correct to infer from this that the law presumes both to have perished at the same moment; this would be establishing an artificial presumption *against manifest probability*" (Best's Ev., Book III, pt. I, p. 369).

It would be remarkable if, after refusing the civil-law presumptions as too arbitrary, founded, as they were, on probability, the common law should have accepted in their stead the equally arbitrary presumption of codemise founded on the most extravagant improbability.

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the next of kin, whoever they were, having *prima facie* right.[1]

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[1] "The next of kin stands as to personalty in the same position as the heir-at-law as to realty, and the person claiming against him must make out his entire title. In the absence of any effectual disposition of the beneficial interest in personalty the next of kin is entitled to it, and the person seeking to dispossess him of it is bound to prove a perfect title and to rebut the *prima facie* case of the next of kin. The onus of proof is therefore upon the defendant. * * * The law of England requires evidence. * * * The master of the rolls is represented in the report of his judgment to have said: 'There is therefore 'no evidence to show who was the survivor and the con-'clusion of law is that both died at the same moment.' According to our view this is not correct. We think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both actually did die at the same moment of time" (Opinion of the law judges).

The Lord Chancellor:

"I follow very much the line of reasoning that was adopted by the learned judges. When a person dies seized in fee of real estate, *prima facie* his heir-at-law is entitled to succeed, and he can only be deprived of that right by some devisee coming forward and showing that some will, valid in form and effectual in point of substance, was made displacing his rights. I am perfectly well persuaded that exactly the same principle is applicable to the case of personal estate; if a person dies possessed of personal estate, *prima facie* the next of kin will be entitled to it, and their right will only be displaced by some person coming forward and showing a valid and effectual disposition taking it away from them.

4. That this rule of the common law was not reversed by the terms of the two wills (*post*, 26).

Just what the master of the rolls had said was: "The result is that I think the defendant has not made out that the contingency has arisen on which his title depends"—a clear statement of failure through inability to shift the onus.

(*a*.) It will be noticed that far from holding, as the case has been interpreted to do (Best, III, part II, p. 369), that the law makes use of no artificial presumptions, in contests

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"The question in the present case is whether the plaintiff, being the next of kin or representing the next of kin, Mr. Wing shows a title depriving her of that to which, in the absence of a valid will she is entitled.

"That depends first of all on the terms of the will, and the will gives the property to Mr. Wing 'in case my wife shall die in my lifetime.' Then comes the question, On whom does the burden of proof rest to show whether the wife did or did not die in the testator's lifetime?

"I think the principle once being admitted that the *prima facie* title is in the next of kin, that it must rest on the person *who claims the property under a bequest giving it to him in that particular event*. It is not for the next of kin to show that the wife did not die in her husband's lifetime; but the person who claims under the disposition must show, *not that probably it might be one way or the other*, but that that state of circumstances did in fact occur which entitles him according to the language of the will to say that the wife did die in her husband's lifetime" (4 De Gex., McN. & G., 685).

That a man leaves an heir is always presumed. Suppose his *only* heir be lost in the same disaster with him.

Title devolves on heir whether he will or not.

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of this nature, the *case itself was ruled on a presumption*, viz., that a decedent's personalty devolves on his next of kin.

(*b.*) The case did dispose of the property *as if* both deaths occurred at the same time, but it did so, *not* because it found from the evidence, or presumed—it refused to do either—that both deaths occurred at the same time, but because such disposal was the effect of presuming devolution of title on next of kin (husband and wife are not "next of kin" to each other), and holding the evidence insufficient to displace that *prima facie* title, thereby defeating the bequests through survivorship.

(*c.*) The case, in principle, no more put the onus on the claimants through survivorship than on the claimants through codemise; it put it on legatees claiming through either, holding that the allotment of onus and *prima facie* right between the opposing sides at the start was to be determined by the capacities in which the parties appeared to the suit, whether as legatees or next of kin, and not by what the evidence might, or might not, disclose respecting the order of the deaths. Had the wills been the reverse of what they were, giving the property to Wing in the event of codemise, but not in the event of a survivorship, the burden of proof, according to the principle of the decision, would have been on him to prove such codemise, the claimants through survivorship having a *prima facie* right as next of kin.

(*d.*) What the case did not hold, and had no occasion to decide, was that the evidence would not have been sufficient had presumption been absolutely neutral.

(*c*.) That the next of kin in that case was a daughter of the testator and had been in the shipwreck, surviving her parents by a few minutes, was wholly immaterial. Had she been an aunt instead of a daughter and on the other side of the earth instead of in the disaster she would, if next of kin, have been entitled just the same under the terms of the decision rendered.

A case that closely follows and well illustrates what Underwood *vs.* Wing decided on the point of *prima facie* right as between legatee and next of kin, and that appears to have been unknown to court or counsel in Newell *vs.* Nichols, is that of Hartshorne *vs.* Wilkins (6 Nova Scotia, 276). Louisa, an illegitimate daughter of Joseph Creighton, and wife of Henry S. Bagnell, was lost, together with her three children, in a shipwreck. Her father's will, made before her marriage, bequeathed a fund in trust to pay Louisa's mother an annuity of £80, and the rest of the income to Louisa for life, the corpus of the fund to go at Louisa's death to her children, or if she died "without leaving any lawful issue" to specified nieces of the testator, subject, in the latter event, to the right of Louisa to dispose by will of £1,000 of the fund. Louisa left a will which gave £600 to her husband and £400 to her mother. Manifestly, if the fund was to be disposed of on the theory that the deaths were simultaneous, the bequests to the nieces and those in Louisa's will were good; but the court held otherwise, ruling, on the authority of Underwood *vs.* Wing, that the beneficiaries, as *legatees*, lay under the fatal onus of proving that Louisa either survived her children or died at the same time, Mr. Creighton's next of kin having *prima facie* right. Mr. Bagnell then took the same

position that the appellee takes here, that as his children were, if they survived their mother, the next of kin to Mr. Creighton, the onus did not lie on them to prove that they survived their mother, but on their adversaries to prove that either she survived her children or died at the same time. The court did not decide on that point, holding that as Louisa was illegitimate, her children, even though they survived her, were not her father's next of kin.

In not one of its features has Underwood *vs.* Wing ever been overruled.

Despite the fact that Newell *vs.* Nichols, instead of overruling Underwood *vs.* Wing, is built upon it, and that it throughout disavows presuming codemise, going so far on appeal as to use the word "impossible" respecting absolute codemise, it has been cited as an authority for the revival and the restoration to the law of that presumption, or at least for what is the same thing, distribution on the theory of non-survivorship. Unfortunately language was used by the court (12 Hun, 618) that, separated from the context, authorizes that view.

Newell *vs.* Nichols, 12 Hun, 604; 75 N. Y., 78.

After citing the cases that, before Underwood *vs.* Wing, had been ruled on a presumption of codemise, and without observing that as to that ground of decision they had been overruled by that case, the court said: "In the case at bar, there being no legal presumption of survivorship, no rights could have been transmitted by one child to the other, nor to his or her heirs or next of kin, and *under the authorities above cited* the burthen of establishing a survivorship rests upon the party who claims any portion of the estate through

such fact." Had this been all, the case must have been regarded as overruling Underwood *vs.* Wing and restoring to the law the old and repudiated presumption of codemise, for to put the onus on either of two opposites, as survivorship and codemise, is of necessity to presume the other; but the case said more. It said (617): "Nor is there any presumption that they all died at the same time," and this wholly neutralized what had been said by the words first quoted, for it served to put the onus likewise on the claimants through codemise, and to put the onus on each of the three sides is to put it on neither.

The turning point of that case was whether the children *were vested* with title to the $15,000 left in trust for each of them; for, if they were, then on their deaths, simultaneously or successively, the title of each *prima facie* devolved, under the authority of Underwood *vs.* Wing, on its next of kin, if not the other child, then the relative next in succession, and the burden rested on the Ridgways and Gunns to prove the codemise of the children and consequent "default of heirs of testatrix's body"

But it was held that the children were *not* vested with title, that the trust was active and the title was in the trustees, and that neither child had any title that could presumptively devolve at its death on the other as its survivor; that if one child had concededly survived the other, while it would have taken the $15,000 that had been held in trust for the other, it would have taken it, not as an inheritance from the other, but as a legacy under the mother's will and so burdened with the onus. In other words, that it was only as a legacy under the mother's will that either $15,000 could pass *to* or *through* one child as the survivor of the

other. This was the correct ground on which Newell *vs.* Nichols was placed (12 Hun., 607, 619, 620–'1–'2–'3), and it in nowise conflicts with Underwood *vs.* Wing. No other view of the case is compatible with the rule that codemise is not to be presumed or either of the three contingencies to be eliminated.

But if, as held in Underwood *vs.* Wing, the order of the death of testatrix and her son is to be treated as unascertainable, each of the three contingencies—the one of codemise as well as the two of survivorship—being unprovable and unpresumed, the result is that the son is not displaced at all as of his mother's death.

There is a line of cases,[1] however—and it is on these the appellants rely to displace testatrix's son as of her death—that, under cover of ambiguous terms, serve to keep alive this rejected presumption of codemise. They disavow presuming codemise, but they do presume it. They say one thing and do another. They assume to find a distinction where none exists, viz., between presuming codemise and judicially acting, in the absence of evidence, on codemise as what befell. Whatever matter of fact is made the basis of decree or judgment and is not proved is, of necessity, presumed. It was over this point that the two decisions below in the case at bar first parted company (28, 37). The vice of the ruling of the equity court lay in this, that while it conceded a failure of the only means, evidence and presumption, whereby the son could be displaced, it dis-

[1] Johnson *vs.* Merithew, 80 Me., 111.
Russell *vs.* Hallett, 23 Kans., 276.
Balder *vs.* Middeke, 92 Ills. App., 227.

placed him. It decreed a failure of the prior bequest to the son without evidence or presumption that such bequest had failed—just what Underwood *vs.* Wing refused to do. It extinguished the preference made by the will and the law in the son's favor, conceding at the same time that the only fact that could effect such extinguishment—the son's non-survivorship of his mother—could not be adjudged. The same vice permeates that entire line of decisions. Probably the best statement of the ground they rest on is that found in Johnson *vs.* Merithew (80 Me., 111). The comments in brackets are ours:

"When several lives are lost in the same disaster, there is no presumption from age or sex [that would not be a presumption, but an *inference* from evidence] that either survived the other; nor is it presumed that all died at the same moment [then neither contingency would start with the advantage of *prima facie* right or the disadvantage of the onus], but the fact of survivorship like every other fact must be proved by the party asserting it [leaving it to be inferred that the other contingency, codemise, is some freak of a fact that, *unlike* every other fact, needs not to be proved by the party asserting it, though unpresumed]. In the absence of evidence from which the contrary [*i. e.*, survivorship] may be inferred all may be considered [*i. e.*, presumed] to have perished at the same moment, not because that fact is presumed [to put the onus on either of two opposites, as survivorship and codemise, is to presume the other], but because from the failure to prove the contrary [*i. e.*, the onus lies on survivorship and in favor of codemise] by those asserting it, property rights must necessarily be settled on that theory."

But why must property rights be settled on that theory? Why, of three possible happenings, must a court, uncon-

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strained thereto by presumption, choose as and for the one that happened the one that almost certainly did not happen? What has law or justice to gain by preferring *im*probability to probability in the finding of facts? If a purse were raised for the fleetest of three horses, and two of them should come in so close together as to make it difficult to decide between them, there might be some justice or necessity for sharing the purse between the two; but for yielding it to the third, which had hardly got across the starting line by the time the race was over, no reason could exist except to relieve the judges of the embarrassment of deciding between the other two.

It is not survivorship alone, but codemise as well, not *two* only but each of the *three* happenings possible, that needs to be either proved or presumed whenever, as here, it is made the basis of claim. If the property in these cases must be denied to the appellee for want of proof or presumption that the son survived his mother, it must be denied to his adversaries for want of proof or presumption that either the mother survived her son or that both died at the same time.

Never was error harder to keep out of the law than this presumption of codemise. Condemned and banished by Underwood *vs.* Wing, it has reappeared again and again, first under one alias, then under another, lastly "as an order of distribution," only to be condemned anew as often as identified. Too indefensible to be avowed, but too convenient to be given up, "an ever-present help in time of trouble," it has been welcomed under its false names while being disavowed under its true one; but throughout all its names

and forms it has always been the same thing, a presumption of codemise and nothing else.

The latest statements of the law on this point take these forms:

"The rule as now established by the English and American cases is that where it is proved that two or more persons perished in the same calamity there is no presumption of law that one survives the others or *that all perished at the same time;* the burden of proving that one survived the others, or *that all perished simultaneously,* is on the person who asserts such to be the fact."

Greenleaf on Evidence, 16th ed., note 5 to sec. 30, p. 126.

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"There being no presumption either of survivorship or *of simultaneous death* and no evidence in the case to sustain a finding of either of those facts it is manifest that the party on whom lay the burden to establish such survivorship *or simultaneous death* has failed to make out his case, and the only question for us to determine is upon which of the parties to the suit such burden was imposed."

Hildebrant *vs.* Armes (decided by the Texas court of civil appeals on Dec. 6, 1901), 66 S. W., 128.

The italicized words would seem to mark a return to the position taken in Underwood *vs.* Wing and an abandonment of the favoritism shown by intervening cases to the contingency of codemise. If so, the three contingencies now stand *in equilibrio*—neither accepted, neither eliminated—the law saying, "The son may have survived, the mother may have "survived, both may have died at the same time,—one of "the three did take place,—but presumption does not say "which one it was." It maintains a strict neutrality, and, evidence failing, it leaves the parties to win or lose accord-

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ing to the allotment among them of *prima facie* right and *burden of proof* at the start.

But what is the precise meaning, as applied to the facts of the cases at bar, of this restored rule of the neutrality of presumption as to the order of the deaths? It cannot mean that courts are ever at liberty, on meeting in their path a *material* question of fact or law difficult of solution, to vault over the trouble, as asked to do in these cases, and light on some new source or line of title of their own legislative devising. That would be manifest error. As the depository of the judicial power, courts must meet and solve every point, no matter how fine, on which rights in litigation are made by law to turn. Hopeless conundrums are unknown and impossible to the law of property. If it be material to the success of either party to these appeals that any fact be determined, be it the elimination or the acceptance of any one of the three contingencies, that fact may not be passed by as unascertainable. It is not material to the success of the appellee that any one of the contingencies be accepted or rejected, for the court may say "the son was preferred, he "may have survived, and so long as that continues to be the "status of the cases the property can be awarded to none "other than his legal representative."

But it *is material* to the success of either appellant that one of the three contingencies be eliminated, the one of the son's survivorship, for, so long as that contingency remains uneliminated, Faul and Wasner cannot be held to have ever been testatrix's next of kin or the Home her legatee. His father having died, the son was preferred as sole beneficiary, both by the will and by the law, and he was alive and well as late as there is any evidence of the two. He may have sur-

vived his mother. Nobody can say that he did not. The preponderance of such evidence as the case admits of is to the effect that he did. His failure to survive and take is a condition precedent to the right of either appellant to take. His non-existence at his mother's death is, to borrow the language of the court in Cowman *vs.* Rogers (73 Md., 403), "a condition that must exist and must be shown to exist before the contingent right of any subsequently entitled beneficiary can possibly ripen into a perfected claim." Not until his *preferred* right be adjudged out of the way can the *deferred* and *contingent* right of either appellant be let in.

Grounds for *prima facie* right at the start.

The restored rule must, therefore, mean that, in determining which party had *prima facie* right at the start, only those grounds are admissible as do not involve the elimination of either of the three contingencies. One such ground, found and acted on in Underwood *vs.* Wing, as before shown, was that whoever is next of kin has *prima facie* right, practically an absolute right, since all the evidence such cases admit of is not enough to take it away.

Another such ground, found and acted upon by the Court of Appeals in the case at bar, is that the preference made in the son's favor gives to the appellee a *prima facie* right, that is practically an absolute right, since the evidence is not sufficient to take it away.

If it should happen, as possibly it may happen in such cases, that conflicting grounds be met with, some yielding *prima facie* right to one, some to another, and some to a third party to the suit, such grounds will need to be weighed

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against each other, and those that are paramount or preferential be allowed to control.

And if cases should be met with where all the parties to the suit stand on absolutely equal footing at the start, as in the instance mentioned (*ante*, 6), or where the decedents were joint tenants or cross-remaindermen, the ascertainment in *some way* of the order of the deaths will not be avoidable. The remedy by interpleader will fall short of being a full and complete remedy in cases of this nature if the evidence be held insufficient to show the order of the deaths where each party to the suit has no stronger claim than the others to *prima facie* right at the start.

The adjudicated cases fall into four classes:

1. Those prior to Underwood *vs.* Wing (1854), avowedly holding codemise to be presumptive.

2. Those like Sillick *vs.* Booth (1 Young and Coll. N. C., 117) and Ommany *vs.* Stillwell (23 Beav., 330) holding that, for want of any other means of decision, the evidence must suffice *where* neither side has *prima facie* right to help, or the onus to hinder, at the start.

3. Those that hold that, though the evidence fails to show and the law to presume which happened of the happenings possible, the property is to be disposed of on the theory (or, as expressed below, "as if there was proof or presumption") that the deaths occurred at the same time (Johnson *vs.* Merithew, 80 Me., 111; Russell *vs.* Hallett, 23 Kans., 276).

4. Those that hold that though no one of the sides has the onus, at the start, because of *any presumption as to which hap-*

pened of the happenings possible, yet, for *other reasons*, the onus does rest, at the start, on some one of the sides, and that it is a fatal onus, since the evidence is not sufficient to shift it.

Underwood *vs.* Wing, 8 H. L., 183.

Hartshorne *vs.* Wilkins, 6 Nova Scotia, 276.

Cowman *vs.* Rogers, 73 Md., 403.

Construction of the Will.

Argument will be presented on the part of Faul and Wasner to the point that the bequest to the Young Women's Christian Home is limited to the contingency of the mother's survival and cannot be extended by construction to include the contingency of simultaneous death. All that the appellee needs to show is that the bequest cannot be extended to cover *more* than those two contingencies; that it stops short at the third; that the *entire* contingency of the son's survivorship belongs to the appellee.

The common-law rule as to burden of proof between legatee and next of kin unaffected by the will.

It will avail the Home nothing to construe the will to give it the property as well if both deaths were simultaneous as if the mother's was last, *unless* proof or presumption be forthcoming that one or the other of those two contingencies (not the son's survivorship) was what befell. If without proof or presumption of either of those two contingencies the Home would succeed, it must secure such construction of the will as will give it the property not only if the mother survived, not only if both she and her son died at the same time, but also even if the son did survive *unless* proof of

such survival be made by his legal representative. In other words, the Home stands in need of such construction of the will as will give it *prima facie* right whatever befell, thereby reversing the common-law rule that as between legatee and next of kin the onus lies on the legatee. Recognizing this fact, the Home, by way of freeing itself of such fatal onus and of acquiring such *prima facie* right, set up in its answer (9) "that the provisions of the will of said testatrix, taken as a whole, clearly show her plain intention that *unless* her son, the said Eugene Rhodes, should survive her, *so that* he might be the beneficiary of her said will *and enter upon and enjoy her estate*, the same should pass, to the exclusion of all other persons whomsoever, to this defendant."

In other words, the Home would have the court read the will as if it said: "On condition that my son survive me for such time and in such condition that he may enter upon and enjoy my estate I give the same to him; otherwise I give it to the Home." No such will is in the case, and the belief is hard to resist that, far from intending to make such a will, the testatrix could not have been prevailed upon to make such a one. The bequest to the son, his father being dead, was without condition, the only unconditioned bequest in the will. It was absolute. It was the bequest to the Home, not that to the son, that was made, and was meant to be made, secondary and conditional.

A much nearer approach to the plain intention, and to the *plain expression* as well, of the will would have been made, it is submitted, had the Home's answer taken this form instead:

"The provisions of the will of the testatrix, taken as a whole, clearly show her plain intention that unless her son,

the said Eugene Rhodes, should predecease her or die at the same time, so that he might not be the beneficiary of her said will and enter upon and enjoy her estate, the same should pass to him to the exclusion of all other persons whomsoever."

The dominant and most natural intention of the will was that the property was not to be willed away from the son at all *unless* he was no longer in being to take it at his mother's death. His non-existence at her death was the dividing line, probably the only dividing line, she had in mind to draw between the bequest to him and that to the Home, and she drew that line with a precision of terms that, as between the appellee and the Home at least, leaves no room for doubt or construction. The will hews to the line. It is not a question of *duration* but of mere *fact* of survival. Any survival was enough, a second being as effectual as a month for the vesting of title. If the fact was, and *was ascertained to be*, that the son survived, though for a second only, and no matter in what mental condition, the appellee's right would be unquestionable, and such is to be taken to have been the testatrix's intention as fully as if such survival had been for a year. The real question is not whether the son survived long enough to do this or do that, but where the burden rests of proving the order of the deaths.

The Home moulded its pleadings to fit the exigencies of the case. It could not prove codemise. It could not prove the mother's survival. It could not, therefore, prove the son's non-survival. It rested at common law under the burden of proof. It could not point to language in the will that reversed that common-law rule or to provisions of the will that were incompatible with it. It *could* prove that the son

did not survive long enough to reap any practicable benefit from the property. That was the most it could prove. It was therefore forced to take the stand it did, viz., that mere survival is not, of itself, enough to vest title in the survivor, but that the survival, in order to have that effect, must be of such nature and duration as to be of some practicable benefit to the survivor. It is not difficult to foresee what would be the effect on titles of a decision upholding this contention, especially in that large class of cases where mother and child die almost simultaneously at time of childbirth.

It is of no concern to the Home whether testatrix's son or her brother and sister constituted her next of kin. She *left* next of kin, and such kin is legally in court, claiming adversely to the Home, and, under the ruling in Underwood *vs.* Wing, such kin has *prima facie* right *unless* deprived thereof by the terms of the will. The advantage of such *prima facie* right can be withheld from the appellee only by holding, as a fact, that testatrix's son never lived to become her next of kin.

Nothing is said in the will about *prima facie* right or burden of proof or about possible difficulty in ascertaining the order of the deaths. It may be—it probably was so—that no thought of such matters was in testatrix's mind when she made her will. Or, it may be, that such difficulty *was* thought of by her, but, as often happens in the drafting of wills, was deemed a contingency too remote to be worth providing against. In either event the result is that the burden of proof is left just where the common law put it, viz., on the Home as legatee to prove whatever fact or facts—simultaneous death or mother's survival—underlies its claim. The

careful wording of the will compels belief that had testatrix thought of any such confusion of facts as that which befell and had intended to provide for it by putting on the part of her son a burden of proof that otherwise would have rested on the Home, she would not have trusted, to that end, to the language now found in the will, but would have employed other and more appropriate terms.

The claim of the Home draws its strength, not so much from what *is* in the will as from what, judging from this post-mortem standpoint, *ought* to be there. It may be easy to believe that had testatrix foreseen that she and her son would die at the same time, or that their deaths would fall in doubtfully ascertainable time-relation to each other, she would in either event have given her property to the Home. Following the same line of thought, it is almost as easy to believe that had she foreseen that though her son would survive her he would survive for a second only, or a minute only, or an hour or day only, or not long enough to reach land, or in a hopelessly insane condition, she would also in that event have given her property to the Home. *But that is not what she did*, and the question is not what kind of a will *ought* to have been made or what kind *would* have been made had things been foreseen that were not foreseen, but what *intention* finds expression in the will that *was* made. It ought to have been provided in the will, and undoubtedly would have been had testatrix thought of it, that if her son predeceased her, leaving issue, such issue, rather than the Home, should have her property; and, further, that if her son should survive her and then die intestate, leaving his father as his heir, the Home, instead of the father, should have the corpus of the property. It is not im-

probable, too, that had it been suggested to her that, at the time of her death, the fact might be that her son had been absent, unheard of, for seven years or more, letting in the legal presumption of his death, she would have deferred that presumption for a further term at least, unless affirmative proof should be made by the Home that neither he nor any issue of his was living at her death.

It would have been competent for the testatrix by her will to put on the part of her son a burden of proof that otherwise would have rested on the Home as legatee, thereby giving to the Home a title defeasible only by proof on the son's part that he survived his mother. But that she did this would imply what nobody can believe, that her purpose in making a will was in part to put the birthright of her son, her only child, that handsome Christian lad who must have been more to her than all the world beside, in a worse plight than if she had died intestate. He was the chief object of her bounty. Her will gave all her property to *him* "to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions" in favor of his father. It would seem that in her heart she could not give him too much or that too absolutely. Manifestly her will as a limitation on his inheritance was made for one purpose only, one that became unnecessary, to provide a life support for his father. It was not made for the purpose of modifying, in any way, the rules of evidence whereby the court was to find the facts upon which the legacies were conditioned or to relieve the court from finding those facts, no matter how difficult the task might prove to be.

To read into the will, after the words "if I become the sur-

vivor," the words "or die at the same time," would be to carry construction to the utmost limit of tolerance, but having done that, to go still a step further and presume that both did die at the same time, thus supplying the necessary testamentary disposition by construction and the necessary fact by presumption, would seem to be unprecedented.

The trouble is here as it was in Underwood *vs.* Wing—not so much to give effect to the bequest over on failure of the prior bequest as *to adjudge a failure of such prior bequest.* In this case, as in that one, authorities are cited—and there are many of them—to the point that where there is a bequest over on failure in a *specified* way of a prior bequest the bequest over takes effect on the failure in *any* way of the prior bequest. But in *all* those cases the failure—*failure in some way*—of the prior bequest was proved or conceded. In the case at bar it is neither proved, presumed, nor conceded that the prior bequest to the son did fail; on the contrary, the very bone of contention is whether it failed or not.

Precisely the same point arose in Underwood *vs.* Wing and it was there ruled in terms that need only change of proper names to read as if written of this case. But in the study of that ruling it is to be kept in mind that the prior bequests in that case were to persons who could hold the status of legatees merely; whereas the prior bequest in the case at bar was to the person who, if he survived his mother, held the status both of sole legatee and sole next of kin.

Speaking of the trial that had taken place respecting Mr. Underwood's will, Lord Cranworth said:

"The wife, it was said in that case, did not, and could not, take anything, and, * * * that being so, the gift to

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the defendant, Mr. Wing, it was said, must, according to the authorities, be held to have taken effect.

"That reason did not convince me. There is abundant authority to show that if a bequest is made to A on one event, and, failing that event, on another event to B, then if the first event *does not happen*, the court may understand the testator to have meant that B should take—

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"But there is not, so far as I am aware, either principle or authority for saying that if there is a bequest to A on a particular event, and failing that particular event, to B, that B can take if it cannot be ascertained whether the event have or have not happened. In such a state of circumstances there is no more right in B than in A.

"The husband has by his will said that if his wife died in his lifetime, Wing should take. In all probability he would also, if it had occurred to him, have said, 'If it cannot be ascertained whether she died in my lifetime or not then also Wing shall take,' but that he has not said.

"On this ground I decided against Wing in Underwood *vs.* Wing. It was uncertain in that case whether Mrs. Underwood did or did not die in her husband's lifetime. * * * Mr. Underwood's next of kin were of course *prima facie* entitled to his personal estate, and as Wing could not displace this title by showing that Mrs. Underwood died in his lifetime, I held with the master of the rolls, that there was nothing to displace the *prima facie* title of the next of kin represented by the plaintiff in that suit.

"It was, as I thought, a fallacy to assume that the bequest to Mrs. Underwood had failed to take effect. Undoubtedly it had failed so to take effect as to give to her any practical enjoyment of the property, for, if she was the survivor, she could not have survived for more than a few seconds, but her survivorship, if she survived but for a second, was sufficient to displace the claim of Wing and to entitle her personal representatives to the whole personal estate of her

husband. The inability to ascertain the truth no more assisted the claim of Mr. Wing than that of Mrs. Underwood's personal representatives.

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"The rule of construction relied on by the appellant might have been contended to have been applicable if the fact had been *and had been ascertained to be* that Mr. and Mrs. Underwood both died at the same instant of time, if that could be possible" (8 H. L., 205, 209).

In the Court of Appeals he had said:

"The person who claims under the (testamentary) disposition must show, not that probably *it might be one way or the other*, but that that state of circumstances did in fact occur which entitles him according to the language of the will" (4th De G., M. N. & G., 685).

Said Lord Chelmsford, speaking of Mrs. Underwood's will:

"She clearly intended that the appellant [the Home] should "not have her property if her husband [son] survived her, "for on that event it was to go to him. The appellant can "only be entitled in case the husband [son] fails to take by "survivorship. If the husband [son] survived the appel- "lant's bequest never came into existence. But he cannot "show that the husband [son] did *not* survive and therefore "he fails altogether" (8 H. L., 221).

Lord Wensleydale said:

"There is not the least doubt that the appellant [Home] "was bound to show that he had a right according to the "true construction of the will under which he claimed. The "*onus probandi* was clearly upon him. * * *

"The evidence leaves it in total uncertainty whether the "husband [son] died before or after the wife [mother] or "whether they both died at the same instant" (8 H. L., 219).

Even Lord Campbell, the lord chancellor, who stood alone in opinion that the Underwood wills, liberally construed, gave the property to Wing in the event of codemise, conceded that codemise must first be proved, and that the onus lay on Wing. Said he (196): "*Prima facie* the next of kin are entitled and the onus is thrown on Wing, the appellant, to show a better title." And again (203): "It has been objected that there is no proof that the gift to the husband has failed. But, with great submission, the failure of this gift is *res adjudicata*." He was referring to the result of the trial below.

Whatever weight his lordship's reasoning is entitled to makes for the *res adjudicata* of the bequest to the son in the cases at bar.

Not till the equity court below had made four separate transpositions or changes of the words of the will did it succeed, and then but doubtfully, in causing them to exempt the Home from the burden of proof or to relieve the court of the duty of finding whether the son survived or not.

Of similar transpositions in the Underwood wills, Lord Wensleydale said (8 H. L., 217):

"But supposing the construction suggested should be adopted and the will read as if it had provided for the gift over 'in case the husband should not survive,' or 'in case the legacy to him should lapse' it would not, in my mind, remove the difficulty."

Wing's case was stronger than is the Home's. He was, in terms, given the property in the event of *either* survivorship; the Home in the event of *one* only.

Probability favored Wing's claim; not so the Home's.

That the bequest over was to take effect on failure of the

prior bequest found as strong support in the language, intention, and provisions of the Underwood wills as in the will of the testatrix.

It is no more a negative to prove that the son did not survive than to prove that the mother did not survive; no more an affirmative to prove that she predeceased him than that he predeceased her. As to their codemise, a proposition is not negative simply because it is narrow; not presumptive in proportion as it is improbable, but just the contrary. Moreover, that line of reasoning defeats itself, for if codemise is so very improbable as to be entitled to be deemed a negative it certainly is too improbable to be acted on as what actually took place in the case.

Suppose the will of Mrs. Rhodes be construed, as it was by the justice holding the equity court, to mean that title would pass to the Home as well if codemise occurred as if the mother survived, what will the Home gain thereby? Nothing on the score of presumption if there be no presumption of the mother's survival and none of codemise, for the sum of two nothings is nothing still. And on the score of evidence, of probability, it will profit little, if any more; for the chance of codemise having actually occurred is too infinitely small to add any computable strength to the chance of the mother's survival. Such construction, while it will put Wasner and Faul out of the cases, will not enable the Home to succeed to their strongest position, that of the next of kin on whom title is presumed to have devolved. The side of the son will be the resulting beneficiary.

If this was a suit by the Home on a contract to pay money if the deaths of E and S took place in the order of E's first and S's last, surely the Home could not succeed on proof

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that the deaths took place in doubtfully ascertainable order, or even on proof that they took place simultaneously.

If it should be held in the case at bar, as it was held in Underwood *vs.* Wing, that, notwithstanding the terms of the will, whoever was next of kin has *prima facie* right, the fatal burden of proof resting on the Home as legatee, the result will be to put the Home out of the case. Then will come the question:

Where Rests the Burden of Proving Who Was Next of Kin?

Consideration of this point has necessarily been involved, to a large extent, in what has heretofore been said of code-mise.

If by "next of kin" Underwood *vs.* Wing meant next after nearer kin lost in the same disaster with the intestate, then, contrary to its expressed denial, that case did hold that some conclusion or presumption flows from the happening of the deaths in the same disaster, viz: That such nearer kin either predeceased the ancestor or died at the same time. Necessarily the equity court drew such a presumption in the case at bar, though it disavowed presuming at all. It said, after conceding that the evidence failed to show what the order of the deaths was, "the heirs and next of kin of Mrs. Sophia Rhodes *who are known to have survived her* would take her estate in the absence of any valid testamentary disposition by her" (28).

The last that was known of the two decedents the son was alive and well, his mother's nearest relative and her preferred legatee. From that position of advantage he must be dis-

placed as of the time of his mother's death, or else his side must succeed. To displace him is part of our adversaries' case. The onus lies on them. If the law presumes that the mother's title passed to her next of kin, and refuses to find from evidence or presumption what the order of the deaths was, the result is that *the son is not displaced at all.* Some presumption, displacing the son, must be construed into the will or be drawn from the disaster, or else the appellants must fail. They need to have the law presume that the position of advantage concededly held by the son when the disaster began was lost to his side by reason of his death falling in doubtfully ascertainable time-relation to his mother's death. Now, it could have been so lost in one of two ways only, viz: (1) by his mother's surviving him—*which the law refuses to presume*—or (2) by the two deaths happening at the same time, *which the law also refuses to presume.*

Not to presume at all is a thing different from presuming that the son did not survive, for then a like presumption would arise that the mother did not survive, and the result of the two would be a presumption that neither survived, a presumption of codemise, which the law refuses. Since the three contingencies are opposites in their nature, presume against any two we may and the result will be a presumption of the third.

What the appellants need is to have the court read into the will and into the law that, if it be doubtfully ascertainable whether a parent leave a child, the one next in succession shall be deemed entitled *instead*, thereby putting the onus on the part of the child. Precisely that end is what the Home seeks in its answer in asking the will to be construed to pass title to it "*unless*" the son's survival be

proved. Precisely such placing of the onus is the effect of those statutory presumptions of codemise that some nations have provided for contingencies of this kind. There is no such statute here. No State of the Union has ever had such a statute, though four (Louisiana, California, North Dakota, and Montana) have statutory presumptions that would cause the son in this case to be deemed the survivor. Here the question of child or no child living at the parent's death is left to be found just like any other fact, the onus resting on *remoter* kin to prove that all *nearer*, once known to exist, had ceased to exist or had been absent, unheard of, for seven years, at the time of the ancestor's death.

Emerson *vs.* White, 29 N. H., 482.
Schaub *vs.* Griffin, 84 Md., 557.
Posey *vs.* Hanson, 10 D. C. App., 496.
Wharton's Ev., sec. 1280.

If these two deaths had occurred far apart in space, but in unascertainable order of time, the principle, as before shown, would be the same; but, in such case, to presume that the son's death occurred before his mother's, or at the same time, would be to so change the seven-year death presumption as to put the onus, in all cases, on the part of that one of the decedents who stood as heir or devisee to the other, to prove such other's predecease, *regardless of the period of the absence*.

Whoever needs to prove that the death of an absentee took place on or before a specified date or event (testatrix's death, for instance) *within* the seven years, or that his life continued to or beyond a specified date or event *after* the seven years, has the onus to bear, such onus shifting from

the death-affirmant to the life-affirmant at the expiry of the seven years. This is what the seven-year presumption means.

Schaub *vs.* Griffin, 84 Md., 557.

One of several heirs has been absent, unheard of, for less than seven years at the time of the intestate's death. Surely the shares of the others are not swollen by that one's part till affirmative proof be made by them that he predeceased or codeceased the intestate. The onus lies on those who would take his share to the exclusion of his creditors. Now, where is the authority or reason for saying that this advantage is lost to his side, and the onus shifted, merely by the finding of his dead body soon after the intestate's death?

To a specified extent distribution in this District is representative, thereafter *per capita*. Now, suppose the last of the representative class be the one whose life is in question, whose survival of the intestate would cause distribution to go *per stirpes*, and whose non-survival would cause a *per capita* distribution. On which the onus? Clearly it would be on the *per capita* claimants if the deaths had fallen far apart or in different calamities. Where is the authority or reason for the shifting of this onus by the happening of the two deaths in the same disaster?

Suppose that "A," and his only heir, "B," and his sole devisee, "C," should perish in the same disaster, and that "A's" property should be claimed by "B's" creditors and by "C's" legal representatives, and by the State as escheator. On which two the onus? Manifestly on the parts of the State and "C," for the law presumes that a decedent leaves heirs and that his property devolves on them, showing that

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prima facie right may exist on the part of kin lost in same disaster with ancestor.

Suppose that in a case of this kind the evidence should show that there was a survivor, but fall short of showing which it was, the intestate or his nearest relative. How could *prima facie* right be accorded to those more remote in succession without presuming that such relative predeceased the intestate?

Considering the son as legatee *only*, his side would succeed could it sustain the onus, but that side is somewhat strengthened by the fact that, if the son survived, he was next of kin also; and how possibly strengthened except by the onus being shifted or neutralized, in either of which events his side must, we submit, prevail.

If this was a question of the *incoming* instead of the *outgoing*, of the *birth* instead of the *death*, of a nearer kin, then the onus might well be held to lie on the one alleging such *change of kinship;* but for that very reason—that the onus lies on the one alleging such change—it here lies on Wasner and Faul.

In analogous cases of alternative or successive right the onus lies on later beneficiaries to displace earlier, and in Cowman *vs.* Rogers (73 Md., 403) it was held to so lie in cases of this nature.

To invent or contrive, for the purposes of the case, a presumption against the *preferred* and in favor of the *deferred* legatee—against *nearer* and in favor of *remoter* kin—would be to proceed in the direction of *defeating* rather than *promoting* the spirit of the will and the law.

Not a single case can be found, we submit, in this country at least, that held, *after contest over the point*, that as between

remoter kin and the representative of nearer lost in the same disaster with the intestate, the burden of proof lies on the latter. Coye *vs.* Leech (8 Met., 271) is the nearest approach to such a case; but no contention was set up in that case that the onus lay on the remoter kin. This omission was undoubtedly due to the fact that at that time (1844) Underwood *vs.* Wing had not arisen, and the rule still prevailed of presuming simultaneous death. In Johnson *vs.* Merithew (80 Me., 111) both parties to the suit were interested that the onus be put on the part of the nearer kin, the children.

Unless this brief has failed of its purpose, it has shown that the decision appealed from cannot be reversed without either (1) accepting codemise as what befell, or (2) believing that testatrix's will was made for the purpose, in part, of detracting from the birthright of her only child. It must overtax human credulity to believe either proposition.

Respectfully submitted.

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